Nos. 84-237 and 84-238

In The
Supreme Court of the United States

October Term, 1984

YOLANDA AGUILLAR, *et al.*,

Appellants,

vs.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,

Appellant,

vs.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

Pursuant to Rule 42 of the Rules of this Court, the National Jewish Commission on Law and Public Affairs ("COLPA") hereby moves for leave to file the attached brief *amicus curiae.*

As indicated by letters on file with the Clerk, the movant has obtained the consent of the parties for the filing

of the brief, counsel for appellees conditioning his consent to our filing by October 25, 1984. The Court postponed the question of jurisdiction in this case to the hearing on the merits on October 9, 1984. It did not order an expedited briefing schedule, but the appellants filed their briefs on October 15, 1984, in order to enable the Court to hear this case together with *School District of the City of Grand Rapids v. Ball,* No.83-990. The Clerk has informed the parties that argument on this case has been tentatively scheduled for December 5, 1984 to follow No. 83-990. Appellees' brief is to be filed on or before November 15, 1984.

The National Jewish Commission on Law and Public Affairs ("COLPA"), has participated *amicus curiae* in numerous cases before this Court involving the Religion Clauses of the First Amendment. See, e.g., *Board of Education v. Allen,* 392 U.S. 236 (1968); *Walz v. Tax Commission,* 397 U. S. 664 (1970) *Dewey V. Reynolds Metals Co.,* 402 U. S. 689 (1971); *Lemon v. Kurtzman,* 403 U. S. 602 (1971); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U. S. 756 (1973); *Wheeler v. Barrera,* 417 U.S. 402 (1974); *Parker Seal Co. v. Cummins,* 429 U. S. 65 (1976); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Widmar v. Vincent,* 102 S. Ct. 239 (1981); *Mueller v. Allen,* 103 S. Ct. 3062 (1983); *School District of the City of Grand Rapids v. Ball,* No. 83-990.

Since the parties proceeded unilateraliy on an expedited basis, the time authorized by Rule 36.2 of the Rules of this Court for the filing of an *amicus* brief has been severely curtailed. It was not possible for the attached brief to be prepared for filing by the time appellants' briefs were submitted. Inasmuch as counsel for appellees

has consented to the filing of the *amicus* brief on or before October 25, 1984, leave to file this brief will not delay the Court's consideration of this case.

The arguments made by the National Jewish Commission on Law and Public Affairs ("COLPA") with regard to the consititutional issues in this case differ from those presented by the parties. From counsel's examination of the briefs filed to date, it appears that none presents the constitutional analysis set forth in the attached brief.

For the foregoing reasons, the National Jewish Commission on Law and Public Affairs ("COLPA") requests that leave be granted to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The National Jewish Commission on Law and Public Affairs ("COLPA") is the volunteer non-profit member-

ship organization of lawyers and social scientists that represents the Orthodox Jewish community in public forums on legal issues that affect the community. We speak, in this case (as we have frequently done before)[1] on behalf of a broad spectrum of the American Orthodox Jewish community, including the following national Orthodox Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

In addition, COLPA files this brief on behalf of the Board of Jewish Education of Greater New York, the

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1. E.g. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Trans World Airlines, Inc. . Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 102 S.Ct. 239 (1981); *Mueller v. Allen*, 103 S.Ct. 3062 (1983); *School District of the City of Grand Rapids v. Ball*, No. 83-990.

educational service agency of the Federation of Jewish Philanthropies of New York.

This case is of direct concern to the Orthodox Jewish community because the decision below wipes out a federally financed program that has assisted thousands of educationally disadvantaged Jewish children residing in low-income neighborhoods by providing for them remedial reading and remedial mathematics programs (taught predominatly by non-Jewish teachers, responsible only to their secular supervisors in the public-school system) merely because these rememdial classes are given in the same buildings where the children receive their religious teaching. The court of appeals recognized that this 18-year-old program had done "much good and little, if any, detectable harm" but nevertheless declared it invalid in an unusual, speculative opinion—after a 3-judge district court had upheld Title I's constitutionality in another action on the same facts, *National Coalition for Public Education and Religious Liberty v. Harris,* 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed, 449 U.S. 808 (1980). The action of the court of appeals is apparently based on its belief that in a 1975 decision a majority of this Court forever barred all forms of publicly financed secular instruction on the premises of a religious school.

The 1975 decision—*Meek v. Pittenger,* 421 U.S. 349—was rendered in a factual vacuum. The Court arrived at certain stated conclusions because it evaluated a challenged law on its face and assumed, from the lack of evidence, that "entanglement" problems would arise in the law's administration. The approach taken by the Court in *Meek v. Pittenger* was analogous to that which the Court takes when it invalidates on its face a law affec-

ting speech because the overbreadth of the law may "chill" protected expression, even if the record fails to demonstrate that protected speech is involved in the particular case.

But this Court has recently warned of the shortcomings of such constitutional analysis of laws affecting speech. The constitutionality of duly enacted and implemented governmental programs should be judged by the experience shown in an actual record, not by hypothetical possibilities that lawyers can imagine. If New York City's administration of the Title I program, as shown by a record of actual performance, is measured against the "entanglement" standard of the First Amendment, it becomes clear that the law is valid because there has not been any "entanglement" of the kind to which the Establishment Clause is directed. New York's real-life experience also demonstrates that its Title I program uses premises other than purely secular and public facilities only when it is absolutely necessary.

There is, in short, a familiar constitutional approach that this Court may apply in deciding whether the *Meek v. Pittenger* "entanglement" rationale applies to this case—the "First Amendment overbreadth doctrine" utilized in cases involving the regulation of speech. New York City's administration of Title I should not be invalidated because of unsubstantiated fears that it may, in the future, result in violations of constitutional liberties if, in actual practice, such violations have not occurred and if the record demonstrates that an important state interest can be carried into effect *only* by the means chosen in the challenged program.

ARGUMENT

I.

THE TITLE I PROGRAM SHOULD NOT BE INVALIDATED BECAUSE IT MIGHT RESULT IN IMPERMISSIBLE "ENTANGLEMENT" IN CASES NOT SHOWN BY THE RECORD

In a recent case involving a statute that dealt directly with speech, this Court repeated "the traditional rule" (*New York v. Ferber*, 458 U.S. 747, 767 (1982):

> [A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situtations not before the Court.

The Court explained why resort to hypothetical possibilities was an imprudent means of determining a law's constitutionality (458 U.S. at 768; footnotes omitted):

> By focusing on the situation before us, and similar cases necesary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."

In the present case Judge Friendly acknowledged for the court below "that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion." The court of appeals held, nonetheless, that the Title I program was unconstitutional—not because in its 18 years of implementation there had been many or some instances of "entanglement" bet-

ween church and state, but only because of a "reasoned apprehension of potentials."

In substance, the court below struck down New York's Title I program because of a concern that administration of law might hypothetically result in "comprehensive, discriminating, and continuing state surveillance" (*Lemon v. Kurtzman,* 403 U.S. 602, 619, (1974)) of the kind prohibited by the Establishment Clause. In fact, the record showed no complaints regarding any excessive state instrusion or policing of the internal affairs of religious schools during the 18 years that Title I programs have been administered by New York City.[2] Hence the law was declared unconstitutional entirely because it might "conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber,* 458 U.S. 747, 767 (1982).

That kind of constitutional analysis was described by this Court in *Ferber* as "strong medicine" that is warranted "only as a last resort." 458 U.S. at 769, quoting from *Broadrick v. Oklahoma* 13 U.S. 601 (1973). The Court concluded, therefore (458 U.S. at 771):

> that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications....

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2. Judge Friendly may be correct in asserting that there was no "incentive for complaint" if any teacher fostered the religion taught in a private school. But, as he noted, the critical issue under *Meek v. Pittenger* was not whether religion was fostered, but whether there had been any "entanglement." The non-public schools had every "incentive to complain" if their independence had been infringed by an inspecting or supervising state official in the administration of Title I. The absence of any such complaint demonstrates that the fear of "entanglement" is chimerical.

In this case, as in *Ferber,* the "legitimate reach" of Title I and of programs of the kind challenged by the plaintiffs "dwarfs its arguably impermissible applications." 458 U.S. at 773. Even if there is a *possibility* that an isolated teacher will be "influenced by a sectarian milieu" or that "active and extensive surveillance" by the City will occasionally be needed to prevent religious influences, there is no question that the overwhelming preponderance of classes taught in the administration of New York's Title I program result in no such dubious consequences. It is inappropriate, therefore, to declare the entire program unconstitutional because of a fear over an unusual possibility that has not been realized.

Meek v. Pittenger, 421 U.S. 349 (1975), can be understood in this context as a case that considered a particular local law as to which no record had been made regarding its constitutional or unconstitutional applications. This Court held that, in such a framework (421 U.S. at 369):

> [T]he District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

In the absence of any evidence whatever, the Court assumed that the "prophylactic contacts" necessary to assure that the local program would be free of sectarian taint would "necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." 421 U.S. at 370. But by using the word "necessarily," the Court majority did not mean to create an irrebuttable presumption of fact. At most, the Court was expressing its understanding of the kind of conduct contemplated by the local law. That understanding can be rebutted by evidentiary facts, and this record contains a wealth of such facts.

II

THE RECORD DEMONSTRATES THAT THIS PROGRAM IS NECESSARY TO IMPLEMENT THE IMPORTANT STATE INTEREST IN EDUCATING DISADVANTAGED YOUNGSTERS

Another related doctrine utilized in freedom-of-expression cases under the First Amendment is useful here. When expression or association is restricted or limited, it is frequently relevant to inquire whether the restriction, if otherwise permissible is excessive — *i.e.*, whether "the governmental interest could be served as well by a more limited restriction...." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 564 (1980). A law which otherwise restricts speech and association may be constitutional if it is the narrowest available means to implement a compelling state interest. Conversely, it is unconstitutional if it sweeps more broadly than necessary. *E.g., Shelton v. Tucker,* 364 U.S. 479, 488 (1960). ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.") This doctrine has been applied, in a different context, to freedom-of-religion cases as well. *E.g., Cantwell v. Connecticut,* 310 U.S. 269, 304 (1940). *See generally, Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *In re Primus,* 436 U.S. 412, 432-33 (1978).

The Court in *Meek v. Pittenger,* 421 U.S. 349 (1975), was faced with a local law that appeared to reach farther than necessary to achieve the legitimate secular objective. Pennyslvania's Act 194, adopted in 1972, declared that children in nonpublic schools were entitled to receive "auxiliary services" from the Commonwealth because their parents were taxpayers, and provided immediately for the allocation of funds to establish "auxiliary services" programs on the nonpublic school premises. 421

U.S. at 352-53, n.2. No showing was made that such services could not be provided in the public schools or at other locations. This Court (as well as the plaintiffs) acknowledged the legitimacy of the secular purpose of the law—"to assure full development of the intellectual capacities of the children of Pennsylvania." 421 U.S. at 367-68. But there was no explanation as to why this result could be achieved, as to enrolless at nonpublic schools, only on their own premises. It seemed possible to supply such services at public school facilities or elsewhere.

The same cannot be said of Title I. The statute does not, by its express terms, direct funding of classes at nonpublic schools. The record establishes that Title I programs were first offered by New York City at public schools after regular school hours. But attendance was poor, as was true when the programs were offered in the private schools after school hours. See Juris St. of the Solicitor General, p. 7. Active consideration was even given to conducting the programs at public schools during school hours, but legal and budgetary problems barred that solution.

The *only* remaining effective means of delivering the remedial services provided by Title I to students at nonpublic schools was to conduct them on nonpublic school premises during school hours. And the best means of achieving a secular and nonsectarian content to these classes was to assign public school personnel to teach at the private school prmises under the supervision of public school administrators.

In every real sense, therefore, the means selected to implement the important governmental goal of Title I involved the least possbile interaction betweeen secular and religious authorities. Under this Court's decisions in the

area of expression, the record establishing that narrow choice lends added constitutional support to the program that is being challenged.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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